Filed 1/21/09 Modified and Certified for Partial Publication 2/4/09 (order attached)

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

In re J.M., a Person Coming Under the Juvenile Court Law.	
THE PEOPLE, Plaintiff and Respondent, v. J.M., Defendant and Appellant.	F054783 (Super. Ct. No. JJD062170) **OPINION**

THE COURT[*]

APPEAL from a judgment of the Superior Court of Tulare County. Kathryn T. Montejano, Judge.

Arthur L. Bowie, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Stephen G. Herndon and Jeffrey A. White, Deputy Attorneys General, for Plaintiff and Respondent.

The juvenile court rejected 14-year-old J.M's claim that he was acting in self-defense when he plunged a sharpened screwdriver into the back of Jorge Flores Rajillo

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[*] Before Vartabedian, Acting P.J., Dawson, J. and Kane, J.

and thus the court found true the allegation that J.M. committed an assault with a deadly weapon. J.M. was sent to a group home. He appeals, claiming the evidence does not support the court's findings, the court failed to determine if the assault was a misdemeanor or a felony, and his conduct credits were improperly calculated.

Background

Jorge Flores Rajillo lived with Alfred Silva in Earlimart. On June 15, 2007, Rajillo was in the back yard of their home repairing an item for a neighbor. At approximately 10 p.m. that evening, Rajillo had told J.M. that he would buy some bicycle rims from J.M. but Rajillo did not have money at that time. Rajillo also told J.M. that if he had money he would loan it to J.M., but he did not have any money.

J.M. returned at approximately 1:30 a.m. while Rajillo was still working in the back of the house. Once again, J.M. asked Rajillo for money. Rajillo told him he did not have any money. As Rajillo turned his back to J.M. and bent down to gather some tools, J.M. stabbed him in the back with a sharpened screwdriver. J.M. then kicked Rajillo and searched his pockets. He then fled.

Rajillo called out to Silva. Silva was asleep in the bedroom when he heard a noise outside and heard Rajillo calling for help. Silva jumped out of the window and pulled a sharpened screwdriver from Rajillo's back. The screwdriver was imbedded five inches into Rajillo's back. Rajillo told Silva that J.M. was his attacker.

The defense included the testimony of three brothers who claimed that Rajillo previously had grabbed or attempted to grab them inappropriately. In addition, J.M. testified on his own behalf. He testified that he had given Rajillo bicycle rims and Rajillo paid him $20 and had agreed to pay him an additional $20 later. J.M. went to Rajillo's house on June 15th at 9 p.m. to collect the money he was owed. When Rajillo did not give him the money, J.M. left and then returned again at 10 p.m., again asking for the money he was owed. The money was not given to J.M.

After midnight on June 16, J.M. returned again to collect his money. Rajillo was in the back of the house. Rajillo tried to grab J.M.'s hand; J.M. pushed him away. As J.M. started to walk away, Rajillo grabbed "his butt." J.M. thought Rajillo was trying to block him from leaving, so when Rajillo bent down to grab something J.M. plunged the screwdriver into Rajillo's back. J.M. thought Rajillo was going to hit him and not let him leave. J.M.'s brother had warned J.M. to not go to Rajillo's because Rajillo might try to "touch him or something."

J.M. testified that he took the screwdriver with him to defend himself. He admitted that when initially questioned by the police he did not tell them about Rajillo touching him because he was ashamed. Later, he told the probation officer about the touching.

A neighbor, Maria Rosales, saw Rajillo and J.M. talking, then the lights went out. Within seconds she heard pushing and shoving and then the lights came back on. When the lights came on Silva was in the back yard with the screwdriver in his hand. This same neighbor said that Silva told her he believed Rajillo tried to do something sexual to J.M.

A Welfare and Institutions Code section 602 petition was filed claiming that J.M. committed a violation of Penal Code section 245, subdivision (a)(1), assault with a deadly weapon, "a felony." In addition, there was a special allegation that the offense was a serious felony within the meaning of Penal Code sections 667 and 1192.7 because J.M. personally used a dangerous and deadly weapon.

On December 10, 2007, after hearing the evidence and arguments of counsel the court found the petition to be true.

On January 22, 2008 the court adjudged J.M. to be a ward of the court and removed him from the custody of his mother and father. The court stated it was the court's intent that J.M. be placed out of home in either a group home or a foster home.

The probation department was directed to find a suitable group home to meet J.M.'s particular needs. The court set the matter for a placement review in two weeks.

The placement review hearing was held on February 6, 2008, and the court was informed that J.M. was going to be transported to a group home the next day. The court continued J.M. as a ward of the court under the supervision of the probation department.

Substantial Evidence

J.M. contends there was insufficient credible evidence to sustain a finding that he did not act in lawful self-defense when he committed the assault. His argument is based on the defense evidence presented, and he concludes the trial court failed to appropriately appreciate and take into consideration the evidence of prior assaults by the victim against others. In addition, he asserts the prosecution and the trial court failed to appreciate that child molestation is an act of violence and a child may use whatever force is necessary to make sure he is not the victim of such violent conduct.

"In addressing a challenge to the sufficiency of the evidence supporting a conviction, the reviewing court must examine the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence—evidence that is reasonable, credible and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citation.] The appellate court presumes in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence. [Citations.] The same standard applies when the conviction [finding] rests primarily on circumstantial evidence. [Citation.] Although it is the jury's [court's] duty to acquit a defendant [minor] if it finds the circumstantial evidence susceptible of two reasonable interpretations, one of which suggest guilt and the other innocence, it is the jury [juvenile court], not the appellate court that must be convinced of the defendant's [minor's] guilt beyond a reasonable doubt. [Citation.] '"If the circumstances reasonably justify the trier of fact's findings, the opinion of the reviewing court that the circumstances might also reasonably be reconciled with a

contrary finding does not warrant a reversal of the judgment."'" (*People v. Kraft* (2000) 23 Cal.4th 978, 1053-1054.)

The trial court summed up the evidence that supported the verdict and also supported the rejection of the defense of lawful self-defense. "The first thing that the Court would have to find in order not to sustain the petition is that there was self-defense. And there are some glaring facts about that day. They include the fact that the minor has articulated how he created the weapon, about how he filed down a screwdriver and turned it into what I would call a stabbing mechanism or something similar to an ice pick he didn't use that day because of any conduct of the victim in this case. It was just something that the minor had fashioned to have with him in case he needed it at some future point.

"Secondly, there is the fact that depending on the evidence, the minor went to that location two to four times repeatedly that day past 12:00 o'clock at night in order to collect money. The minor indicates that he believed that George Flores [Jorge Flores Rajillo] was reaching down as if to pick something up or that he dropped something. These are the words of the minor.

"And then there is the evidence, the four seconds. Ms. Rosales was very eager to tell her story and was very precise about certain details and the fact that the George Flores was stabbed in the back.

"I want to make something very, very clear. If this conduct that George Flores -- it has been testified to by other witnesses, the Court is in no way, no way condoning such conduct. So, I want to make that perfectly clear.

"But the facts of that night are not consistent with that other conduct as it appears to the Court. Additionally, it's the Court's recollection that there was flight by the minor after the crime took place."

The evidence supported the trial court's conclusion that the facts of the night are not consistent with J.M.'s asserted claim of self defense. His argument fails.

II. Declaration of Offense as a Felony or Misdemeanor

As previously set forth, the petition alleged that J.M. committed an assault with a deadly weapon. This allegation was described as a felony. In addition, the petition contained a separate allegation that the assault was a serious felony because J.M. personally used a dangerous and deadly weapon. At the disposition hearing the court found the petition to be true. The court did not state on the record at any time whether the assault was a misdemeanor or a felony.

Assault with a deadly weapon, a violation of Penal Code section 245, subdivision (a)(1) is punishable as either a misdemeanor or a felony. J.M. asserts this matter must be remanded to the juvenile court because that court failed to declare whether his offense was a felony or a misdemeanor and there was no indication that the court was aware of its discretion.

Welfare and Institutions Code section 702 requires the juvenile court to declare whether an offense is a felony or a misdemeanor when an adult may be punished alternatively for a felony or misdemeanor. This requirement is obligatory on the juvenile court and remand is required when the juvenile court fails to make this finding. (*In re Manzy W.* (1997) 14 Cal.4th 1199, 1203-1204.) However, the remand requirement is not automatic whenever the juvenile court fails to make a formal declaration. "Thus, speaking generally, the record in a given case may show that the juvenile court, despite its failure to comply with the statute, was aware of, and exercised its discretion to determine the felony or misdemeanor nature of a wobbler. In such case, when remand would be merely redundant, failure to comply with the statute would amount to harmless error." (*Id*. at p. 1209.)

While we recognize that "neither the pleading, the minute order, nor the setting of a felony-level period of physical confinement may substitute for a declaration by the juvenile court as to whether an offense is a misdemeanor or felony" (*In re Manzy W.*, *supra*, 14 Cal.4th at p. 1208), we find that remand here is not required.

First, J.M. was not merely charged with assault with a deadly weapon. The petition also contained a special allegation that the assault was a serious felony because J.M. personally used a deadly or dangerous weapon. The court found the petition to be true, thus necessarily finding that the assault was a serious felony based on the special allegation.

Also, the minute order does not merely state that the assault is a felony. It states, "The court has considered that violation of ... PC245(A)(1) [Penal Code section 245, subd. (a)(1)] would be a misdemeanor or a felony if committed by an adult; and declares that violation of PC245(A)(1) is a ... felony." Not only is this explicit language included in the minute order, but the minute order was signed by the judicial officer who presided at the jurisdiction hearing. Thus the order here was more than a minute order prepared by the clerk stating that the offense was a felony--the order here explicitly stated the court had considered whether the offense was a misdemeanor or a felony and was signed by the judicial officer who presided over the hearing.

When we consider the fact that the serious felony allegation was found true and combine that with the express statement in the minute order signed by the judicial officer, we conclude that a remand would be redundant.

III. Custody Credits

The probation officer's report calculated that as of January 9, 2008 J.M. was entitled to 177 days of custody credits. J.M.'s disposition hearing did not take place until January 22, 2008, yet the court awarded only 177 days of credit. At the hearing on January 22, 2008 the court removed J.M. from his parent's custody and placed him in the custody of the probation department with the intent that he be placed in a foster or group home. The court then set a date for a "two week placement review." J.M. was detained in juvenile hall during the interim period. On February 6, 2008, the "review hearing," it was reported that J.M. would be transported on February 7, 2008 to a group home. No additional credits were awarded at this time.

J.M. contends the court erred in not awarding him 13 days of custody credits for the period between January 9, 2008 (the date of the preparation of the probation report) and January 22, 2008 (the date of the disposition hearing) when he was confined in juvenile hall. The people concede this was error and that J.M. is entitled to an additional 13 days of custody credits.

In addition, J.M. contends he is entitled to an additional 16 days of credit for the time he spent in juvenile hall from January 22, 2008, prior to his commitment and transportation to the group home on February 7, 2008. The People dispute this contention, arguing simply that J.M. is not entitled to any additional credit for time spent in juvenile hall following the disposition hearing but prior to his placement in the group home.

Welfare and Institutions Code section 726, subdivision (c) provides in pertinent part that "the minor may not be held in physical confinement for a period in excess of the maximum term of imprisonment which could be imposed upon an adult convicted of the [same] offense...." Physical confinement includes placement in juvenile hall.

"Because an adult would be entitled to presentence custody credit under Penal Code section 2900.5, this has been interpreted to mean that an equivalent amount of time must be subtracted from a minor's maximum period of physical confinement. [Citations.] Inasmuch as a minor is not 'sentenced,' it would simply be incorrect to refer to this as 'presentence' custody credit. In the juvenile context, the correct term is 'precommitment' [citation] or 'predisposition' custody credit. [Citations.]" (*In re Antwon R.* (2001) 87 Cal.App.4th 348, 352.)

In *In re Eric J.* (1979) 25 Cal.3d 522 the court held that in order to carry out the mandate of Welfare and Institutions Code section 726, subdivision (c), the minor must be given "precommitment" credit for the days he was detained in juvenile hall pending resolution of the charges against him. (*Id*. at p. 536.)

Although J.M.'s disposition hearing took place on January 22, 2008, he was detained in a secure facility, juvenile hall, until February 7, 2008. Thus he was entitled to credit for time served in a secure facility prior to his commitment to the group home. To hold otherwise would deprive him of receiving any credit for this interim time that he spent in a physical confinement.

J.M. is entitled to additional confinement credits of 29 days.

Disposition

The court is ordered to file an amended minute order reflecting that J.M. is entitled to 29 days of additional precommitment credit. In all other respects, the judgment is affirmed.

Filed 2/4/09

CERTIFIED FOR PARTIAL PUBLICATION

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THE PEOPLE, Plaintiff and Respondent, v. J.M., Defendant and Appellant.	F054783 (Super. Ct. No. JJD062170) **ORDER GRANTING REQUEST FOR PARTIAL PUBLICATION;** **CORRECTION OF CLERICAL ERROR**

THE COURT:

On page 4 of the opinion, the section entitled "Substantial Evidence" should be designated as part I.

It appearing that the nonpublished opinion filed in the above entitled matter on January 21, 2009, meets the standards for publication specified in California Rules of Court, rules 8.1105 and 8.1110, it is ordered that the opinion be certified for publication in the Official Reports, with the exception of the Background and parts I and II.

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VARTABEDIAN, Acting P. J.

WE CONCUR:

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DAWSON, J.

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KANE, J.